Supreme Court, U.S.
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No. 92-568

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OHIO,
Petitioner,

v.

DAVID WYANT,
Respondent.

STATE OF OHIO,
Petitioner,

v.

JAMES MAY, JR., et. al.,
Respondent.

STATE OF OHIO,
Petitioner,

v.

CLANCY VAN GUNDY, et. al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENTS WYANT, STATON, PLESSINGER, CLANCY VAN GUNDY, KREBS, & CULP

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QUESTION PRESENTED FOR REVIEW

I. SHOULD THIS COURT REVIEW A CASE IN WHICH THE SUPREME COURT OF OHIO RESTED ITS DECISION UPON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUNDS?

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JURISDICTION

The judgment of the Ohio Supreme Court was based upon adequate and independent state constitutional law grounds. Therefore, 28 U.S.C. Section 1257(a) does not confer jurisdiction in this Court. **See Michigan v. Long**, 463 U.S. 1032 (1983); **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562 (1977).

STATEMENT OF THE CASE

Respondents accept the Petitioner's statement of the case, with the following correction. Petitioner is incorrect in its assertion that Ohio Revised Code Section 2927.12 is a penalty enhancement statute. Petition for Writ of Certiorari at 3. Far more than simply enhancing the penalty for the commission of one of the underlying offenses, this section creates the whole new offense of ethnic intimidation. A violation of this section is an offense of the next higher degree than that of the underlying offense and subjects the offender to a new, much higher range of penalties. In all of the cases subject to this petition, the offenses charged were changed from misdemeanors to felonies.

SUMMARY OF THE ARGUMENT

The decision of the Ohio Supreme Court in this case rested solidly on independent and adequate state constitutional grounds. Therefore, this Court lacks jurisdiction to accept this case. **Michigan v. Long**, 463 U.S. 1032 (1983).

The Ohio Supreme Court also held that R.C. 2927.12 violates the First Amendment. In **R.A.V. v. City of St. Paul, Minnesota**,

___ U.S. ___, 112 S.Ct. 2538 (1992), this Court settled the First Amendment issue raised in this case. The decision in **R.A.V.** controls the First Amendment analysis of Ohio Revised Code Section 2927.12 and compels the conclusion that that law is unconstitutional under the First Amendment.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE JUDGMENT OF THE SUPREME COURT OF OHIO IS BASED ON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL GROUNDS.

The Supreme Court of Ohio held that "the effect of R.C. 2927.12 is to create a 'thought crime.' This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution." **State v. Wyant**, 64 Ohio St. 3d 566, 579 (1992).[1] Although the court discussed both the federal and state constitutions, the Petitioner is incorrect when it implies that the court first found that R.C. 2927.12 violated the First Amendment and that its additional holding that the statute violated the Ohio Constitution was therefore "foreordained." Petition for Writ of Certiorari at 19. Rather, the Ohio Supreme Court plainly stated that it was relying directly upon the more specific language found in the Ohio Constitution. That statement precludes the

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[1] The Petitioner is thus incorrect in its characterization of the opinion below as resting solely on "freedom of **speech**." Petition at 5 (emphasis added).

granting of the writ of certiorari sought by the Petitioner. See **Michigan v. Long**, 463 U.S. 1032, 1037 and n. 3 (1983).

In an effort to avoid the "independent and adequate state grounds" rule promulgated by this Court in **Michigan v. Long** and other cases, the Petitioner misstates previous opinions of the Ohio Supreme Court. The Supreme Court of Ohio has not held that Section 11, Article I of the Ohio Constitution grants no broader protection than the First Amendment.[2] The Petitioner has misrepresented the language quoted from **State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals**, 63 Ohio St. 3d 354 (1992). The language quoted by the Petitioner was not that of the Ohio Supreme Court, but that of the Court of Appeals below in that case. The lower court's opinion in **Rear Door Bookstore** was not "adopted" by the Ohio Supreme Court, as stated by the Petitioner, Petition at 19; rather, the Ohio Supreme Court simply "affirmed on authority of the court of appeals' decision below ... **attached as an appendix** to this Opinion." 63 Ohio St. at 355 (emphasis added). Furthermore, the language in **Rear Door Bookstore** relied upon by the Petitioner is not part of the court's syllabus. Under Ohio law, only the syllabus "states the controlling point or points of law decided." Rule 1(B), Ohio Supreme Court Rules for the Reporting of Opinions (1983). See

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[2] The Ohio Supreme Court has not been reluctant to hold provisions of the Ohio Constitution to be coextensive with analogous provisions of the federal Constitution, and states such holdings quite explicitly. A recent example is **State v. Self**, 56 Ohio St. 3d 73, 79 (1990)(holding confrontation clause of Ohio Constitution Article I, Section 10, coextensive with Sixth Amendment Confrontation Clause), an opinion authored by Justice Brown, the same Justice who wrote the opinion in the present case.

Ohio v. Johnson, 467 U.S. 493, 497-98 n. 7 (1984); **State ex rel. Donahey v. Edmonson**, 89 Ohio St. 93 (1913); **see also Perkins v. Benguet Mining Co.**, 342 U.S. 437, 441-42 (1952).

Rear Door Bookstore therefore cannot be relied upon as a statement of the Ohio Supreme Court that Section 11, Article I of the Ohio Constitution is coextensive with the First Amendment to the federal Constitution. Rather, the Ohio Supreme Court's language in **Wyant** itself demonstrates that that court has now held that the Ohio Constitution does indeed grant protection to thought that is independent of the protection guaranteed by the federal Constitution.

The syllabus of **State v. Wyant** reads: "The effect of R.C. 2927.12 is to create a 'thought crime,' **in violation of Section 11, Article I of the Ohio Constitution**, and the First and Fourteenth Amendments to the United States Constitution." **Wyant**, 64 Ohio St. 3d at 566 (emphasis added). In **Ohio v. Johnson**, this Court recognized "Ohio courts do not suggest that the opinion is not germane to interpreting the court's holding as expressed in its syllabus." 467 U.S. at 497, n. 7. The Ohio Supreme Court's opinion in **Wyant** demonstrates that its holding rested on the Ohio Constitution as an independent basis for its decision. The Ohio Supreme Court noted, as an alternative basis for its holding, that punishment of thought also offends the First Amendment to the United States Constitution. **Wyant**, 64 Ohio St. 3d at 567-77. However, this does not mean that the court's state law holding was, as the Petitioner would have it, "foreordained" by its interpretation of the First Amendment. As this Court has stated:

> [A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.

Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989)(emphasis in original). **See also California v. Freeman**, 488 U.S. 1311, 1314 (1989), certiorari denied (1989), 489 U.S. 1017, (denial of application for stay)("Discussion of federal law -- specifically the First Amendment -- ... constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid.").

Indeed, the Ohio Supreme Court went on to point out that, unlike the First Amendment, Section 11, Article I of the Ohio Constitution contains language directed not only toward speech, but toward thought itself:

> The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. **The Constitution of Ohio is even more specific**; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to **have** "sentiments on all subjects."

Wyant, 64 Ohio St. 3d at 577 (quoting Ohio Const., Art. I, Sec. 11)(first emphasis added).

The Ohio Supreme Court specifically relied on this particular language of the Ohio Constitution, which is not found in the federal Constitution and which is directed toward the protection of freedom of thought, the infringement of which was the fatal flaw of R.C. 2927.12. This demonstrates that the Ohio Constitution constitutes an adequate and independent basis for the court's decision. Thus, this Court is without jurisdiction to review the judgment of the Ohio Supreme Court. **Michigan v. Long**, 463 U.S. 1032 (1983); **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562 (1977).

Finally, it should also be noted that in the Ohio Supreme Court, the defendants raised several other challenges to R.C. 2927.12. The Ohio Supreme Court reserved ruling on those issues, stating: "These arguments may have merit, especially in view of the concurring opinion by Justice White in **R.A.V. v. St. Paul**. However, because of our holding we need not address these challenges." 64 Ohio St. 3d at 579-80 (citation omitted). Those reserved challenges, too, rested on state constitutional law grounds. For this reason as well, this Court should deny the petition for certiorari.

II.

THIS COURT'S DECISION IN R.A.V. v. CITY OF ST. PAUL, MINNESOTA, ___ U.S. ___, 112 S.Ct. 2538 (1992), HAS ALREADY DETERMINED THE FIRST AMENDMENT ISSUE PRESENTED BY THE PETITIONER.

As discussed above, the Ohio Supreme Court's decision in this case is based on adequate and independent state

constitutional law grounds. This Court has recently engaged in a similar analysis under the First Amendment.

In **R.A.V. v. City of St. Paul, Minnesota**, ___ U.S. ___, 112 S.Ct. 2538 (1992), this Court clarified that even in areas in which government may, consistently with the First Amendment, regulate or punish expression, it may not do so based upon the content or viewpoint of the expression. Thus, although certain categories of expression, such as "fighting words" (the category ostensibly at issue in the present case), may be punished, the punishment may not be based upon the government's hostility or favoritism toward the message expressed. **Id.** at ___, 112 S.Ct. at 2545.

Not only does R.C. 2927.12 impose additional punishments for an offender's motives (which in itself creates a thought crime), it does so only for motives with a particular content: the only motives punished are those involving "race, color, religion, or national origin." As this Court emphasized in **R.A.V.**, "[t]he First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." **Id.** at ___, 112 S.Ct. at 2547 (citing **Simon & Schuster Inc. v. Members of the N.Y. Crime Victims Bd.**, ___ U.S. ___, 112 S.Ct. 501 (1991); **Arkansas Writers' Project, Inc. v. Ragland**, 481 U.S. 221, 229-30 (1987)). Like the ordinance held unconstitutional in **R.A.V.**, R.C. 2927.12 offends the First Amendment because of its selective punishment of "'bias-motivated' hatred and ... 'virulent notions of racial supremacy.'" **R.A.V.** at ___, 112 S.Ct. at 2548.

The Petitioner contends that the harm caused by crimes including bias elements is qualitatively different from the harm caused by other crimes. However, that additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint. The same offensiveness, alarm, and sense of disempowerment is caused by bigoted speeches, books, and demonstrations, all of which are indisputedly protected by the First Amendment. Where the same message is communicated by illegal conduct, even expressive conduct, the message does not shield the conduct; the criminal act may be punished as always. However, the offensive message itself does not lose its constitutional protection. Thus, one who burns a flag "by reason of" opposition to government policies may constitutionally be punished for a violation of a public burning law; but the government could not constitutionally upgrade the offense on the basis of the offender's motive for the offense or the message conveyed thereby, despite any additional harm or offensiveness it may create. In **Texas v. Johnson**, 491 U.S. 397 (1989), and **United States v. Eichman**, 494 U.S. 1021 (1990), this Court explicitly acknowledged that flag burnings cause greater and more widespread effects than other unlawful burnings. However, because the "plus" element was the impact of the offender's opinion, the content of his or her communication, it could not constitutionally be the basis for additional punishment.

In **R.A.V.**, this Court considered the same argument, acknowledging the special harm of bias-related crime and the state's interest in recognizing and protecting particular

vulnerabilities of groups who have historically been victimized. Nevertheless, even this compelling interest did not justify the content and viewpoint basis for punishment: "[W]hat makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily." ___ U.S. at ___, 112 S.Ct. at 2548.

Moreover, assertion of a compelling state interest does not end the analysis. Because the statute infringes freedom of thought, it is subject to strict scrutiny. In **R.A.V.**, this Court rejected St. Paul's contention that, despite the ordinance's regulation of expression based on hostility towards its protected ideological content, the selective prohibition was permissible because it was narrowly tailored to serve a compelling state interest in protecting the rights of members of groups historically subject to discrimination. Although this Court acknowledged the importance of the asserted interest, it rejected the argument that the content- and viewpoint-based regulation was necessary to serve that interest; "it plainly is not," said this Court, because content- and viewpoint-neutral alternatives existed. Id. at ___, 112 S.Ct. at 2550.

> In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing

> unique limitations upon speakers who (however benightedly) disagree.

Id. (footnote omitted).

Likewise, the State of Ohio has at its disposal content-and viewpoint-neutral means to punish all conduct reached by R.C. 2927.12. The statutes criminalizing the offenses the commission of which is a necessary predicate to violation of R.C. 2927.12 already do exactly that. **Wyant**, 64 Ohio St. 3d at 570, 579. The Petitioner argues that additional penalties are necessary to redress the special harms caused by bias-motivated crimes. However, as written, R.C. 2927.12 does not address any such additional effects, only the content of the offender's motives. In addition to the punishment of thought this scheme creates, motive is not even a valid surrogate for those effects.

In any event, content- and viewpoint-neutral alternatives exist to address additional effects, as well. Should a legislature determine that additional penalties are necessary for those additional effects, it need only construct a statute addressing effects rather than motives: for example, a statute upgrading offenses where the offender acted "with specific intent to create terror in a definable community," or "with specific intent to issue a threat of further crime." Such formulations are content and viewpoint neutral. They would still reach all the conduct contemplated by R.C. 2927.12 (and more besides, such as drive-by shootings, threats to abortion clinics, and poisoning of bottles of painkillers). The existence of such adequate content-neutral alternatives thus confirms the unconstitutionality of R.C. 2927.12 just as it did that of the

St. Paul ordinance in **R.A.V.**: "The existence of adequate content-neutral alternatives ... 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law.'" ___ U.S. at ___, 112 S.Ct. at 2550 (citations omitted).

Petitioner suggests that the decision of the Ohio Supreme Court in the present case "impacts" federal and state antidiscrimination laws, and urges this Court to grant certiorari to "preserve" and "ratify the continuing validity of" those laws. Petition for Certiorari at 13, 14. In so doing, the Petitioner invites this Court to exceed the limits of its jurisdiction and to render an advisory opinion on the constitutionality of an array of statutes which are not at issue before the Court in the present case.

Furthermore, the **Wyant** opinion, far from inviting challenges to antidiscrimination laws or providing authority therefore, specifically distinguishes those laws. The Ohio Supreme Court addressed and rejected the Petitioner's contention below that, because the federal and state antidiscrimination laws are constitutional, R.C. 2927.12 must be, too. **Wyant**, 64 Ohio St. 3d at 575. The court distinguished civil statutes, such as those prohibiting employment discrimination, as "analytically distinct in several ways from the statute in question here." **Id.** Under such laws, explained the court, "[i]t is the **act** of discrimination that is punished, not the thoughts (or bigotry) of the actor." **Id.** (emphasis in original).

Finally, the Petitioner's reliance on **Dawson v. Delaware**, ___ U.S. ___, 112 S.Ct. 1092 (1992), and **Barclay v. Florida**, 463 U.S. 939 (1983), is misplaced. Not only is the Ohio Supreme Court's decision in the present case consistent with **Dawson** and **Barclay**, it is supported by them. Both **Dawson** and **Barclay** dealt with factors that could be considered only after the appropriate sentencing range had already been fixed. R.C. 2927.12, by contrast, creates a new and much higher range. More important, **Dawson** and **Barclay** stand simply for the proposition that the First Amendment creates no "**per se** barrier to the admission of evidence concerning one's beliefs ... at sentencing." **Dawson**, ___ U.S. at ___, 112 S.Ct. at 1097. Racist sentiment, although protected by the First Amendment, may, like anything else, be used as evidence of content-neutral sentencing factors. However, it is an unfounded leap of logic to rely upon **Dawson** and **Barclay** for the novel proposition that because First Amendment-protected activity may under some circumstances be used as evidence of content-neutral sentencing factors, that activity may itself be a sentencing factor, let alone a substantive element of an offense.

In **Barclay**, this Court found that consideration of this evidence was permissible not because it was itself an allowable aggravating factor, but because it was relevant to an existing, content-neutral statutory aggravating factor; namely, that the offense was committed in an "especially heinous, atrocious, or cruel" manner. **Barclay**, 463 U.S. at 949. In **Dawson**, this Court rejected the use of racial hatred as evidence of a neutral aggravating factor. In fact, the dissent in **Dawson** characterized

the majority's opinion as holding that "the First Amendment limits the aspects of a defendant's character that [sentencing courts and juries] may consider." **Dawson** at ___, 112 S.Ct. at 1104 (Thomas, J., dissenting)(emphasis added).

Thus, both **Barclay** and **Dawson** make clear that even the introduction of a defendant's hatreds and bigotries as evidence of some other, content-neutral, aggravating factor must be undertaken only with utmost caution and only under very limited circumstances. They do not state that hatreds and bigotries may themselves be punishable elements.

Hatred, bias, and prejudice, repugnant as they may be, are indisputably opinions and beliefs on social issues, and as such are constitutionally protected from punishment. As this Court once said, "the freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." **West Virginia Bd. of Educ. v. Barnette**, 319 U.S. 624, 642 (1943).

CONCLUSION

For the foregoing reasons, the Respondents ask this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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